FOR PUBLICATION

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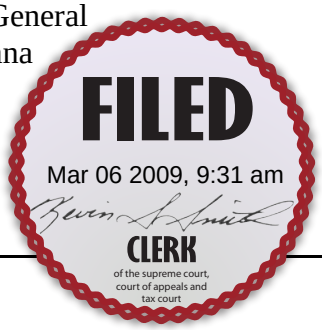

IN THE
COURT OF APPEALS OF INDIANA

JAMISON C. HUDSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-0806-CR-355
	)	
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0711-FA-1249

March 6, 2009

OPINION - FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jamison C. Hudson (Hudson), appeals his convictions for child molesting, as a Class A felony, Ind. Code § 35-42-4-3, and child molesting, as a Class C felony, I.C. § 35-42-4-3.

We affirm in part, reverse in part, and remand with instructions.

ISSUES

Hudson raises two issues, which we restate as:

(1) Whether the State provided sufficient evidence to prove beyond a reasonable doubt that Hudson was at least twenty-one years of age when he committed child molesting; and

(2) Whether the trial court committed reversible error when it admitted evidence of Hudson's other acts of child molesting for which he was not charged.

FACTS AND PROCEDURAL HISTORY

H.K. was born on March 25, 1996. When she was approximately four or five years old, Hudson moved in with her and her mother in Evansville, Indiana. Hudson and H.K.'s mother eventually married, and now have two children of their own.

In the latter half of 2007, H.K. and a friend were watching a movie trailer for a horror movie on the internet that they were not permitted to watch. Hudson caught them and instructed H.K.'s friend to go home. He told H.K. that he would not tell her mother about the incident if she played the "magic sucker" or "flower stick" game with him. (Transcript p. 18). According to H.K. the "magic sucker" game involved H.K. being blindfolded and Hudson placing his penis in her mouth, and the "flower stick" game

involved Hudson rubbing his penis with H.K.'s hand. (Tr. pp. 19, 25). Hudson had played each of those games with H.K. when she was younger at times when her mother was at work or asleep. This time, H.K. refused to submit to either of these "games" and told her mother about them, and how Hudson had played them with H.K. in the past. H.K. also told her mother that Hudson had inserted his penis into her vagina and licked her breasts on one occasion.

H.K.'s mother contacted the police. On November 9, 2007, the State charged Hudson with two counts of child molesting, as Class A felonies, and one count of child molesting, as a Class C felony. The acts for which he was charged consisted of placing his penis in H.K.'s mouth, placing his penis in H.K.'s vagina, and licking her breasts. On April 21, 2008, Hudson filed a motion *in limine* requesting that the trial court exclude any evidence of sexual contact between Hudson and H.K. for which he had not been charged. That same day, a jury trial began. During the direct examination of H.K., Hudson objected to testimony regarding the "flower stick" game, arguing that Hudson had not been charged with any crime for rubbing his penis with H.K.'s hand. The trial court overruled that objection and denied the motion *in limine* at this time. The jury trial continued on April 22, 2008, and, after the close of evidence, the jury returned a verdict finding Hudson guilty of Count I, child molesting, as a Class A felony, and Count III, child molesting, as a Class C felony.

On May 7, 2008, Hudson filed a motion for directed verdict pursuant to Ind. Trial Rule 50, asserting that the State had presented no evidence that Hudson was at least twenty-one years of age at the time of his crimes as required for a conviction of child

molesting, as a Class A felony, as charged. On May 14, 2008, the trial court held a sentencing hearing. At this hearing, the trial court explained that circumstantial evidence supported the jury's finding that Hudson was at least twenty-one years old when he committed his offenses and denied Hudson's motion for directed verdict. The trial court sentenced Hudson to thirty years for child molesting, as a Class A felony, and four years for child molesting, as a Class C felony, with the sentences to be served consecutively in the Department of Correction.

Hudson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Hudson first contests the sufficiency of the State's evidence. Specifically, he argues that the State presented no evidence that would support the jury's conclusion that he was at least twenty-one years old at the time he committed child molesting as a Class A felony.

Our standard of review with regard to sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is

appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

For Count I, the State charged Hudson with child molesting as a Class A felony, by alleging that sometime between January 1, 2000, and August 31, 2006, Hudson submitted to deviate sexual conduct with H.K., a child under fourteen years of age, and at the time Hudson was at least twenty-one years of age.[1] Indiana Code section 35-42-4-3(a) provides that:

> A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:
>
> (1) it is committed by a person at least twenty-one (21) years of age;
>
> (2) it is committed by using or threatening the use of deadly force or while armed with a deadly weapon;
>
> (3) it results in serious bodily injury; or
>
> (4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

The State did not allege or present any evidence of deadly force, deadly weapons, serious bodily injury, or drugs or controlled substances being used in the deviate sexual conduct. So, if the conviction of Hudson for child molesting as a Class A felony is to stand, the

[1] The Information references "I.C. 35-42-4-3(b)" for this count, however the allegations closely follow the requirements of subsection (a) of that statute. (Appellant's App. p. 9). The abstract of judgment does not provide a statutory citation. Because both parties acknowledge by their arguments that Hudson's conviction was based upon Indiana Code section 35-42-4-3(a), and no challenge was made to the Information below, we will consider Hudson's conviction as being under that subsection.

State must have presented evidence beyond a reasonable doubt that Hudson was at least twenty-one years old when he committed that crime.

Here the State provided no direct evidence of Hudson's age at the time of the offense. Rather, the trial court found when confronted by Hudson's motion for a directed verdict that Hudson's age had been proven by circumstantial evidence.

Our supreme court addressed a similar situation in *Staton v. State*, 853 N.E.2d 470, 474 (Ind. 2006). Staton, a college freshman, engaged in sexual intercourse with a fifteen-year-old girl and was charged with sexual misconduct with a minor, which required the State to prove beyond a reasonable doubt that Staton was at least eighteen years old when the offense occurred. Our supreme court explained that, if considered alone, "the fact that Staton had graduated from high school in 2003 or the fact that he was a freshman in college would not prove beyond a reasonable doubt that he was at least eighteen years old in January 2004." *Id.* at 475. However, the Staton Court concluded that testimony from the victim that she "imagined" or "understood" Staton to be at least eighteen at the time of the crime was sufficient considering that Staton could have easily rebutted that testimony if it were not true. *Id.*

At the trial, Hudson testified, but the State failed to ask his birth date or elicit any specific evidence that would directly prove his age when he committed his crimes. The State lays out the circumstantial evidence of Hudson's age by stating as follows:

> H.K. testified that her birthday is March 25, 1996. She testified that Hudson came into her life when she was approximately four or five years old. According to that testimony, Hudson began dating H.K.'s mother [] around 2000. That testimony is consistent with [the mother's] testimony that Hudson lived with them in a house on Benninghof Street that she

> purchased in 2000 when H.K. was four years old. In addition, Hudson testified that he met [H.K.'s mother] on an internet dating website in 2000.

(Appellee's Br. p. 5). This evidence is comparable to the evidence that Staton had graduated from high school and was a freshman in college, not the victim's testimony that she "imagined" or "understood" Staton to be at least eighteen years old. Additionally, the State argues that Hudson was required to be eighteen in order to use an online dating service, but there is no evidence in the record which supports this inference.[2] Even if we accepted the State's inference that Hudson had to have been eighteen to use an online dating service, Hudson was alleged to have committed his crime sometime between 2000 and 2006. The State's inference would make it very possible that Hudson was under twenty-one for half of the period during which he was alleged to have committed his crime. The State has not directed our attention to any testimony showing that Hudson committed his crime during 2004 through 2006, as opposed to during 2000 through 2003. For these reasons we conclude that the State did not present sufficient evidence to sustain his conviction for child molesting as a Class A felony, and reverse that conviction.

That being said, when a conviction is reversed on appeal, we may remand and order the trial court to enter a judgment of conviction on a lesser-included offense if the evidence is sufficient to support the lesser offense and that offense is factually included in the charged crime. *Neville v. State*, 802 N.E.2d 516, 518 (Ind. Ct. App. 2004). "The

[2] The State provides a footnote in its brief stating that it checked the requirements of numerous online dating services and each required users to be at least eighteen years of age. However, this information was not presented to the trial court, and is not properly before us now.

lesser-included offense is factually included in the crime charged if the charging instrument alleged that the means used to commit the crime included all the elements of the alleged lesser-included offense." *Id.* The information alleged that Hudson submitted to deviate sexual conduct with H.K., a child less than fourteen years old, all of the facts necessary to convict Hudson of child molesting as a Class B felony, and by returning a verdict of guilty to the charge child molesting as a Class A felony, the jury necessarily found those facts. Hudson has not challenged the sufficiency of the evidence submitted to prove those facts, and we therefore remand for the trial court to enter a judgment of conviction for child molesting as a Class B felony, and to sentence Hudson accordingly.

II. *Admission of Evidence of Uncharged Sex Acts*

Hudson also argues that the trial court abused its discretion when it admitted evidence of other sexual encounters with H.K., aside from those for which he was charged and convicted. Specifically, Hudson contends that the evidence that he rubbed his penis with H.K.'s hand violates Ind. Evidence Rule 404(b).

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Gauvin v. State*, 878 N.E.2d 515, 520 (Ind. Ct. App. 2007), *trans. denied*. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. Even if a trial court errs in ruling on the admissibility of evidence, this court will only reverse if the error is inconsistent with substantial justice. *Id*. Any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the probable impact of the evidence upon

the fact finder is sufficiently minor so as not to affect a party's substantial rights. *King v. State*, 799 N.E.2d 42, 49 (Ind. Ct. App. 2003), *trans. denied*.

Indiana Code section 35-37-4-15 specifically addresses the admission of evidence of prior acts of child molesting during prosecutions for child molesting. However, we have previously stated that this statute is a nullity because it conflicts with the common law rules of evidence—namely Ind. Evidence Rules 403 and 404. *See Day v. State*, 643 N.E.2d 1, 2-3 (Ind. Ct. App. 1994), *trans. denied*; *see also Brim v. State*, 624 N.E.2d 27, 33, n.2 (Ind. Ct. App. 1993), *trans. denied*. Indeed, our supreme court first incorporated reliance upon the 404(B) factors when addressing the "depraved sexual instinct" exception which had prior thereto made it permissible for the State to introduce evidence of uncharged sexual acts when the defendant was facing charges of incest, sodomy, criminal deviate conduct, or child molesting. *Lannan v. State*, 600 N.E.2d 1334 (Ind. Ct. App. 1992). Therefore, we will consider the trial court's decision to admit the evidence in light of Evid. R. 404(b).

Evid. R. 404(b) prohibits evidence of other crimes, wrongs, or acts by stating as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Thus, evidence is excluded under Evid. R. 404(b) only when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. *Willingham v. State*, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Evidence of uncharged misconduct which is probative of the defendant's motive and which is "inextricably bound up" with the charged crime is properly admitted under Rule 404. *Id*.

To begin, we note that the State charged Hudson with three different specific acts of child molesting: Count I, placing his penis in H.K.'s mouth; Count II, placing his penis into the vagina of H.K.; and Count III, licking H.K.'s breasts to satisfy sexual desires. During the trial, the trial court permitted H.K. to testify regarding the "flower stick" game, which involved Hudson rubbing his penis with H.K.'s hand, in addition to testifying about the three acts for which Hudson was charged.

It is apparent that the "flower stick" game was a separate and unique act from the acts for which Hudson was charged. Nevertheless, the State contends that the "magic sucker" game and the "flower stick" games were similar, in that the names seemed innocuous although the games involved a child performing sexual acts on Hudson, and therefore the evidence of those games was inextricably bound up. However, at trial, H.K. was able to independently and fully describe the "magic sucker" game prior to moving on to describe the "flower stick" game. She never testified that the "flower stick" game took place in conjunction with any of the other acts of child molesting. Therefore, we conclude that the evidence of the "flower stick" game was not inextricably bound up with the evidence of Hudson's child molesting acts for which he was charged.

The State has not provided any argument that the evidence of the "flower stick" game was introduced to prove motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. We have already concluded that the "flower stick" game was a separate and distinct act from the sexual acts for which Hudson was charged. Moreover, Hudson presented no defense that the episodes H.K. described occurred but were not for the purpose of sexual gratification, happened on accident, or H.K. confused him with another molester.[3] Just as our supreme court concluded in *Lannan*, we can find no reason that the evidence of the "flower stick" game would be admissible under a 404(b) exception "without forcing a square peg in a round hole." *Lannan*, 600 N.E.2d at 1341; *see also Greenboam v. State*, 766 N.E.2d 1247, 1254-55 (concluding that evidence of prior molestations not admissible under Evid. R. 404(b)). Therefore we are left with one conclusion: that the trial court abused its discretion when it admitted evidence of the "flower stick" game.

Nevertheless, H.K. presented direct and specific testimony describing the events where Hudson blindfolded her and placed his penis in her mouth, about five times, and pulled up her shirt and licked her breasts while she was laying on her bed trying to watch television. Given this powerful evidence presented at trial, we conclude that H.K.'s testimony about the "flower stick" game probably only had a minor impact on the jury

[3] Hudson contended that he played games with H.K. which he called the "magic sucker game" and the "flower stick game." (Tr. pp. 128-30, 142). But, according to Hudson, those games did not involve H.K. touching his penis. As such, Hudson's defense was not that the episodes described by H.K. occurred, but were not for a sexual purpose; rather, his defense was that the episodes described by H.K. never happened.

that did not affect Hudson's substantive rights. Therefore, the admission of H.K.'s testimony about the "flower stick" game was harmless.

CONCLUSION

Based on the foregoing, we conclude that the State presented insufficient evidence to sustain Hudson's conviction for child molesting as a Class A felony, and we reverse that conviction. However, the charging Information factually included the crime of child molesting as a Class B felony, and the jury necessarily found Hudson guilty of those facts when it returned a verdict of guilty of child molesting as a Class A felony. Therefore, we remand and instruct the trial court to enter a judgment of conviction for child molesting as a Class B felony, and to resentence Hudson accordingly. Additionally, we conclude that the trial court abused its discretion when it admitted evidence of Hudson's uncharged acts of child molesting; however, the probable impact of this evidence upon the jury, in light of the powerful evidence regarding his acts for which he was charged, was so minor that this error was harmless.

Affirmed in part, reversed in part, and remanded with instructions.

VAIDIK, J., concurs.

DARDEN, J., concurs in part and dissents in part with separate opinion.

IN THE
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JAMISON C. HUDSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A04-0806-CR-355
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

DARDEN, Judge, concurring in part and dissenting in part

I fully concur in the conclusion that the admission of H.K.'s testimony about the "flower stick" game was harmless error. As to the issue on which the majority reverses, I must acknowledge that the State could have easily avoided the situation that confronts this Court by simply inquiring of the defendant's age during the testimony of several witnesses, including Hudson or his former wife, L.H., who is H.K.'s mother, hereinafter (Mother). Further, I don't believe that Hudson's age was a disputed issue of material fact in this case.[4] As a result, I must respectfully dissent from the majority's conclusion that Hudson's conviction for child molesting as a class A felony must be vacated and judgment of conviction entered as a class B felony, because of the State's failure to

[4] In closing, neither the State nor Hudson argued to the jury whether the facts, as presented, were sufficient to conclusively establish that Hudson was at least twenty-one years of age at the time he committed the offense, a material element that the jury needed to determine before it could render a verdict of conviction.

provide conclusive evidence that Hudson was at least twenty-one years of age at the time he committed the charged offense.

In the case of *Staton v. State*, 853 N.E.2d 470, 473 (2006), our Supreme Court held that when the legislature chooses to include the age of the defendant as an element of the crime of sexual misconduct with a minor, then the age of the defendant must be proven by the State beyond a reasonable doubt. The State charged *Staton*, a freshman in college, with the crime of sexual misconduct with a minor, as a class C felony. *See* Ind. Code § 35-42-409. Therefore, the manner in which the crime was charged required "proof beyond a reasonable doubt that at the time of the incident, Staton was at least eighteen years of age, and the [victim] was more than fourteen but less than sixteen years old." *Id.* at 472. During the trial, the victim testified as to her age and date of birth, as did her girlfriend, who had accompanied Staton and the victim to his dormitory room; such established that the victim was fifteen years old at the time of the incident. The victim estimated Staton to be approximately four years older than herself; however, other than her estimation, the State failed to present conclusive evidence as to Staton's date of birth or age at the time of the incident. Staton did not testify or present any evidence during his trial, as the burden of proof remained with the State. *Id.* at 472. Our Supreme Court held that the State need not "present conclusive evidence of age," and that the "jury can apply its common sense" to the record before it. *Id.* at 475. It further noted that the jurors' application of common sense includes the expectation that they "draw[] upon their accumulated background knowledge and experience." *Id.* Accordingly, our Supreme Court held that based upon the evidence presented, the jury could draw the "permissible

inference" that the evidence established beyond a reasonable doubt that the defendant was at least eighteen years old at the time he committed the crime. *Id.* at 476.

Here, the State alleged that between January 1, 2000 and August 31, 2006, Hudson committed the offense of child molesting, as a class A felony, against H.K. *See* I.C. § 35-42-4-3(a). Trial took place April 21–22, 2008. Therefore, for the jury to have found Hudson guilty of the charged crime beyond a reasonable doubt, the jury had to have found that Hudson was at least twenty-one years of age when he committed the offense between January 1, 2000 and August 31, 2006, as instructed by the trial court.

I find two aspects of the instant case that readily distinguish it from *Staton*. First, the age difference between H.K. and Hudson is significantly greater than had been the age difference between Staton and his victim. It is undisputed that H.K. was four years old when she first met or came into contact with Hudson. Second, and of weightier import in this case, Hudson testified, which gave the jury the opportunity to observe his physical appearance, demeanor and level of maturity as he testified.[5] At trial, Hudson testified that his relationship with Mother began in the year 2000. He testified that he initially stayed with Mother and H.K. overnight and weekends, but he eventually moved in with them as a family in March of 2001; that he was employed as a cable contractor in the year 2000 when he first met Mother; that over the years, the family had moved to several residences in two states; that he and Mother married and he fathered her two children, A.H. and H.H., who were five years old and two years old, respectively, at the

[5] According to the affidavit for probable cause, Hudson's date of birth is August 28, 1973. Thus, the jury had before it a man who was probably twenty-seven years of age when he first met H.K. in 2000, and who at the time of his testimony before them was nearly thirty-five years of age.

time of the trial. Mother also testified that Hudson was employed as a cable contractor when they started dating in 2000, and she had been employed with a mortgage company, processing mortgage applications.

Hudson further testified that to better provide for the family, he worked for awhile as a deckhand for a barge company from March of 2001 until August of 2002; however, the rigorous scheduling demands of the work caused him to return to employment performing cable contracting for internet and cable TV in late 2002. Hudson was asked, "during [his] approximate seven year marriage" to Mother, who had been the primary-wage-earner of the household, and he answered, "I was." (Tr.138). Mother was asked several of the same questions and her testimony was consistent with Hudson's testimony. She also testified that their marriage was dissolved in March, 2008.

The trial court's preliminary instructions specifically instructed the jury as to the date of the crime and the age of the defendant, in Count I, to-wit: "between January 1, 2000 and August 31, 2006, Jamison C. Hudson being at least twenty-one (21) years of age, did submit to sexual deviate conduct with a child under the age of fourteen (14) years…" Preliminary Instruction 2. The offense, as defined by statute in Preliminary Instruction 3, instructed the jury that the crime was "committed by a person at least twenty-one years of age." Thus, the jury was instructed prior to hearing any testimony that in order to convict Hudson, the evidence must establish that he was at least twenty-one years of age when he committed the offense against H.K. The final instructions to the jury mirrored the foregoing Preliminary Instructions and will not be repeated herein. Hudson has not challenged the accuracy of the jury instructions or that the instructions

were misleading or ambiguous. Therefore, we presume that a jury follows the instructions of the trial court. *Pruitt v. State*, 622 N.E.2d 469, 473 (Ind. 1993); *Tormoehlen v. Statek* 848 N.E.2d 326, 333 (Ind. Ct. App. 2006), *trans. denied*.

In summary, both Hudson and Mother provided substantial testimony describing their relationship and marriage of approximately seven years. Furthermore, and of greater weight is the fact that the jury was in the best position to observe Hudson's physical appearance, his demeanor and his level of maturity as he testified extensively; evidence which the jury could take into consideration in deciding whether Hudson had been at least twenty-one years of age when he committed the crime. Thus, consistent with *Staton*, the circumstantial evidence presented, along with the jurors' right to rely upon their observations, common sense, accumulated knowledge, and experiences, allowed them to reasonably conclude beyond a reasonable doubt that Hudson was at least twenty-one years of age at the time he molested against H.K.

Accordingly, I would affirm the trial court.